

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

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IN RE:

UNITED CITIES GAS COMPANY, a
Division of ATMOS ENERGY
CORPORATION, INCENTIVE PLAN
ACCOUNT (IPA) AUDIT

PETITION OF UNITED CITIES GAS
COMPANY, a Division of ATMOS
ENERGY CORPORATION, TO AMEND
THE PERFORMANCE BASED
RATEMAKING MECHANISM RIDER TO
ITS TARIFF

DOCKET NO.
01-00704

**ENERGY AND WATER DIVISION STAFF'S RESPONSE TO CONSUMER
ADVOCATE'S RENEWED MOTION TO SUMMARILY DENY MOTION TO APPROVE
SETTLEMENT AND ALTERNATIVELY TO TREAT THE MOTION AS A MOTION FOR
SUMMARY JUDGMENT**

The Staff of the Energy and Water Division of the Tennessee Regulatory Authority ("Staff") respond to the *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternately to Treat the Motion as a Motion for Summary Judgment* ("Renewed Motion" or "Motion") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") as set forth below.

The Consumer Advocate presents its *Renewed Motion* in two parts, "Summary Denial" and "Summary Judgment," and with each requests that the outstanding relief requested by Staff and Atmos Energy Corporation ("Atmos") in the *Motion to Consolidate and for Approval of Settlement Agreement* ("Settlement Agreement") be denied. Staff has addressed below the Consumer Advocate's arguments in the order in which they were presented in its *Motion*.

Summary Denial

The Consumer Advocate cites *Harbour v Brown for Ulrich*, 732 S.W.2d 598, 599 (Tenn. 1987) in support of its continuing complaint that because it is a party to this docket, and because it has not joined in requesting the relief outlined in the *Settlement Agreement*, the relief requested in the *Settlement Agreement* must be denied. The Consumer Advocate continues to ignore the distinction between a settlement where (as in this docket) two of three parties to the docket signal to the Authority that they have settled their differences and seek approval of a petition through a contested case proceeding and (as is not the case in this docket) a settlement where all three parties join in the presentation of a settlement agreement for consideration by the Authority. The Authority's consideration of the *Settlement Agreement* in the context of a contested case provides the Consumer Advocate the due process it seems to complain it is being denied. Although the issue presented for decision in the *Harbour* case is not relevant here¹, the *Harbour* case is as good as any to demonstrate why the Consumer Advocate's continuing complaint must continue to be rejected.

The *Harbour* case involved the last-minute withdrawal from a "Contract to Settle" entered into by the parties to the case on the day of trial. Prior to entering an order, the trial court was informed that one of the parties had withdrawn from the "Contract to Settle." The trial court nevertheless enforced the terms of the "Contract to Settle" over the objection of the party who had withdrawn its consent to the settlement, declined to hear the matter on the merits, and dismissed the case with prejudice.² On appeal, the Tennessee Supreme Court held that a court

¹ The issue in the *Harbour* case was stated by the court as "can a trial judge enter a valid Order of Compromise and Dismissal after being informed by one of the parties that consent to the compromise has been withdrawn?" See *Harbour v Brown for Ulrich*, 732 S.W.2d 598 (June 22, 1987)

² *Harbour v Brown for Ulrich*, 732 S.W.2d 598, 599 (June 22, 1987)

may not enter judgment based on a compromise agreement with notice that one of the parties no longer consents to the agreement.³

The Consumer Advocate is not in the same position as the party who attempted to withdraw from the "Contract to Settle" in the *Harbour* case. Unlike the unfortunate party in the *Harbour* case, the Consumer Advocate is not being forced to comply with the terms of the *Settlement Agreement*. Rather, the Consumer Advocate has been afforded the opportunity to conduct discovery and the opportunity to raise objections on the merits. Unlike the *Harbour* case, there will be a hearing on the merits and the Consumer Advocate will have the opportunity to participate in that hearing. Staff has not asked that the terms of the *Settlement Agreement* be imposed on the Consumer Advocate. Rather, Staff has asks that the *Settlement Agreement* be approved, by order in writing, after a hearing. Accordingly, Staff respectfully submits that the *Settlement Agreement* should not be summarily disposed of one way or another and should instead proceed to hearing.

Summary Judgment

Here the Consumer Advocate proceeds on the faulty premise that, because the Consumer Advocate has not joined in the *Settlement Agreement*, the *Tennessee Rules of Civil Procedure* require that the *Settlement Agreement* be treated as a motion for summary judgment.⁴ The Consumer Advocate's premise is faulty because, although TRA Rules require that discovery be conducted in accordance with the *Tennessee Rules of Civil Procedure*,⁵ contested cases before the Authority are not otherwise generally subject to the *Tennessee Rules of Civil Procedure*.

³ *Harbour v Brown for Ulrich*, 732 S.W.2d 598, 600 (Tenn. 1987).

⁴ *Renewed Motion*, p. 2 (June 3, 2004).

⁵ See TRA Rule 1220-1-2- 11(1)

Rather, these proceedings are governed by the Uniform Administrative Procedures Act (“UAPA”), the TRA’s enabling statutes, and the TRA’s rules regarding contested cases.⁶

Through a footnote, the Consumer Advocate suggests that Rule 1 of the Tennessee Rules of Civil Procedure supports the Consumer Advocate’s faulty premise that the Consumer Advocate’s “failure to join the motion for approval of the settlement converts it into a motion for summary judgment in substance.”⁷ Rule 1 of the *Tennessee Rules of Civil Procedure* is helpful on this point because it delineates the scope of the rules and identifies the forums that are subject to them.

Rule 1 of the *Tennessee Rules of Civil Procedure* states that these rules govern the procedure for all civil actions in the circuit and chancery courts of Tennessee (and in courts exercising the jurisdiction of circuit and chancery courts).⁸ Proceedings before the Authority are not included in the scope of the *Tennessee Rules of Civil Procedure* identified in TRCP 1. Were a motion for summary judgment pending in this docket, it would be appropriate to rely on the *Tennessee Rules of Civil Procedure* for guidance in resolving such a motion to the extent that the TRA’s rules and the UAPA are not adequate to do so. It is not appropriate, however, to use these inapplicable rules as a “back door” for introducing otherwise inapplicable requirements and thereby converting a motion that ultimately seeks approval of a petition after a hearing on the merits to a motion seeking approval of a petition prior to a hearing on the merits.

The Consumer Advocate characterizes the efforts of Atmos and the Staff in this docket as “insisting on a judgment—by motion.”⁹ The Consumer Advocate cites several cases in support of what appears to be its argument that, in essence, Staff and Atmos should have filed a petition,

⁶ See *Jackson Mobilephone Co., Inc. v. Tennessee Public Service Com’n*, 876 S.W.2d 106, 111 (Tenn. App. 1993).

⁷ *Renewed Motion*, p. 2 n.1 (June 3, 2004).

⁸ Tenn. R. Civ. P. 1.

⁹ *Renewed Motion*, p. 2 (June 3, 2004).

rather than a motion, seeking approval of the *Settlement Agreement*.¹⁰ The cases cited by the Consumer Advocate are helpful on this point because they each illustrate the same principal: the effect of a pleading is more important than its title.

The first case cited by the Consumer Advocate regarding its summary judgment argument is *Usrey v. Lewis*, 553 S.W.2d 612 (Tenn. App. 1977). Here the Tennessee Court of Appeals looked past an inappropriately titled filing entitled “Motion to Dismiss on Plea of Res Adjudicata” and treated it as a properly filed answer raising the affirmative defense of res judicata.¹¹

The second case cited by the Consumer Advocate for its argument that the *Settlement Agreement* must be treated as a summary judgment motion and that “to proceed in any other fashion, moreover, would be to unjustly and inappropriately elevate form over substance”¹² is *Lewis v. Allen*, 698 S.W.2d 58 (Tenn. 1985). Here the Tennessee Supreme Court granted an appeal to determine whether a complaint properly stated a cause of action for malicious prosecution.¹³ An essential element of a claim of malicious prosecution is the establishment of facts showing that a prior suit or judicial proceeding was instituted against the plaintiff and finally terminated in favor of the plaintiff, that the prior suit was brought with malice on the defendant’s part, and that it was brought without probable cause.¹⁴ In deciding the sufficiency of the complaint of malicious prosecution the Court addressed the threshold issue of whether bringing an action before an administrative section of a police department constituted the institution of a quasi-judicial administrative proceeding.¹⁵ The Court noted that the complaint

¹⁰ Given that the *Settlement Agreement* ultimately seeks approval of the petition originally submitted in Docket No 02-00850, such a filing would have led to the curious circumstance of filing a petition for the approval of a petition

¹¹ *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. App. 1977)

¹² *Renewed Motion*, p 2 n 2 (June 3, 2004).

¹³ *Lewis v. Allen*, 698 S.W.2d 58 (Tenn. 1985).

¹⁴ *Lewis v. Allen*, 698 S.W.2d 58, 59 (Tenn. 1985).

¹⁵ *Lewis v. Allen*, 698 S.W.2d 58, 59 (Tenn. 1985).

under consideration failed to provide information regarding the powers and procedures of the administrative section of the police department but, despite this apparent deficiency, declined to dismiss the complaint and instead remanded the case to the trial court finding that it nevertheless contained sufficient allegations for a complaint of malicious prosecution.¹⁶ The Court did so in part by following precedent set in *Kauffman v A.H Robins Co* , 448 S.W.2d 400, 403 (1969) which looked past a strict interpretation of the term “prior judicial proceeding” finding that such a proceeding “need not be conducted in a ‘court’ in the strict technical and legal sense.”¹⁷ The Court found that the complaint at issue clearly alleged the institution of charges that were terminated in the plaintiff’s favor and that the complaint alleged that the charges were made maliciously and without probable cause.¹⁸ Thus the effect of the complaint considered by the Supreme Court was to allege that the administrative section of the police department was a quasi-judicial forum. The Court looked past the complaint’s apparent omission of facts to back up this allegation and gave the complaint its proper and intended effect, allowing the issue of the nature of the administrative section of the police department to be determined upon remand to the trial court.¹⁹

The third case cited by the Consumer Advocate in support of its argument that the *Settlement Agreement* should be read as a motion for summary judgment is *Tennessee Farmers Mutual Insurance Company v. Farmer*, 970 S.W.2d 453 (Tenn. 1998). Here the Tennessee Supreme Court reviewed a defendant’s inappropriately entitled “Motion to Reconsider” and found it to be, in substance, a motion to alter or amend judgment.²⁰ The distinction was important because without the proper characterization, the commencement of the time for the

¹⁶ *Lewis v Allen*, 698 S W.2d 58, 60 (Tenn 1985)

¹⁷ *Lewis v Allen*, 698 S W 2d 58, 59 (Tenn 1985)

¹⁸ *Lewis v Allen*, 698 S W 2d 58, 59 (Tenn 1985)

¹⁹ *Lewis v Allen*, 698 S W 2d 58, 60 (Tenn 1985)

²⁰ *Tennessee Farmers Mutual Insurance Company*, 970 S W 2d 453 (Tenn 1998)

filing a notice of appeal would not have been tolled. Even though it was entitled “Motion to Reconsider,” the defendant’s motion nevertheless asked the trial court to alter or amend its judgment in the defendant’s favor.²¹ The Court noted that if it were to consider only the form of the motion then the defendant would not prevail on appeal because the title “Motion to Reconsider” was not included among those which toll commencement of the time for filing a notice of appeal under the *Tennessee Rules of Civil Procedure*.²² However, the Court looked past the title of the pleading and focused on its effect noting, “courts must consider the substance of a motion.”²³ The Court also pointed to Tenn. R. Civ. P. 8.05 which states that “no technical forms of pleading or motions are required.”²⁴ The Court held that “when determining whether a post-trial motion is one of those designated by the rules of civil and appellate procedure as tolling commencement of the time for filing a notice of appeal, courts must consider the substance of the motion, rather than its form.”²⁵

With these three cases the Consumer Advocate seems to ask the Authority to read something into the *Settlement Agreement* that substantively is not there and to ignore the fact that a procedural schedule has been agreed to by the parties and entered by the Hearing Officer. The *Settlement Agreement*, which uses the terms “settlement” and “motion” should be read together with the substance of what it asks for and in the context of the agreed upon procedural schedule previously entered in this docket. The *Settlement Agreement* signals the resolution of differences between two of three parties to this docket, details requested relief, and asks for a hearing. The agreed procedural schedule provides for discovery and a hearing. The substance of these documents demonstrates that this proceeding is a contested case operating pursuant to the TRA’s

²¹ *Tennessee Farmers Mutual Insurance Company v Farmer*, 970 S W 2d 453, 454 (Tenn. 1998)

²² *Tennessee Farmers Mutual Insurance Company v Farmer*, 970 S W 2d 453, 455 (Tenn. 1998)

²³ *Tennessee Farmers Mutual Insurance Company v Farmer*, 970 S W 2d 453, 455 (Tenn. 1998)

²⁴ *Tennessee Farmers Mutual Insurance Company v Farmer*, 970 S W 2d 453, 455 (Tenn. 1998)

²⁵ *Tennessee Farmers Mutual Insurance Company v Farmer*, 970 S W 2d 453, 455 (Tenn. 1998).

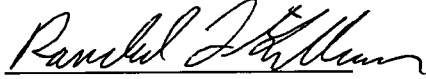
rules of procedure for contested cases. No motion for summary judgment should be inferred from either the *Settlement Agreement* or the procedural schedule.

The Consumer Advocate asks the Hearing Officer to deny the *Settlement Agreement* in part because of the “administrative deference owed the CAD.” Although it would be unfair to give administrative deference to any party in a contested case and notwithstanding the differences in position between Staff and the Consumer Advocate in this docket, Staff likewise notes the statutorily distinct status²⁶ of the Consumer Advocate before this Authority as a successor to the former Public Service Commission’s consumer advocacy section and that the Consumer Advocate has earned a distinguished and deserved reputation for expertise and advocacy in furtherance of the interests of consumers in its own right. However, Staff respectfully requests that the Consumer Advocate’s motions to summarily deny the *Settlement Agreement* or alternatively to treat the *Settlement Agreement* as a summary judgment motion be denied.

²⁶ See Tenn. Code Ann. § 65-4-118

Respectfully submitted,

ENERGY AND WATER DIVISION
OF THE TENNESSEE REGULATORY AUTHORITY



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via hand delivery or U.S. Mail, postage prepaid, upon the persons listed below this 7th day of June, 2004.

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